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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of RICHARD E. and JANET SWEET.	H021363 (Santa Clara County Super. Ct. No. FL031863)
RICHARD E. SWEET, Respondent, v. JANET SWEET, Appellant.	

In a post-judgment dissolution proceeding, wife Janet Sweet sought modification of husband Richard Sweet's spousal support obligation.[1] The trial court denied Janet's motion. On appeal, Janet contends that the trial court applied the wrong standard, and erred in failing to find a change in circumstances. We disagree, and therefore affirm the order.

SCOPE OF REVIEW

"Preliminarily, spousal support ' "must be determined according to the needs of both parties and their respective abilities to meet these needs. [Citation.] In this regard, a trial court has broad discretion and an abuse thereof only occurs where it can be said that no

[1] For ease of reference, we will refer to the parties and their children by their given names. (See *In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 494, fn. 1.)

judge reasonably could have made the same order." ' [Citations.] Similarly, whether a spousal support order should be modified is a matter within the sound discretion of the trial court, predicated upon a showing of a material change of circumstances since the last spousal support order." (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 76-77, fn. omitted.) "Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders." (*In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 50.) The rule requires that the appellate court engage in all intendments and presumptions in support of the trial court's findings and consider the evidence in a light most favorable to the respondent. (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 237-238.) We emphasize that a trial court abuses its discretion when it modifies a support order in the absence of a material change of circumstances. (*Id*. at p. 237.)

BACKGROUND

After a marriage of almost 27 years, the parties separated in June 1993, and Richard petitioned for dissolution of the marriage. At the time the parties had one minor daughter, Marjorie, born in 1978, and an adult daughter, Emilie, born in 1974. The judgment of dissolution, status only, was filed on December 27, 1993.

A supplemental judgment, which included the original support orders, was filed in July 1995. The circumstances were as follows: Janet was employed as an accountant, earning $7,917 per month, and Richard was employed as a computer scientist, earning about $12,500 per month. The parties shared Emilie's college costs. In addition, both children were in counseling, and the parties shared those costs. Janet requested that the court reserve jurisdiction over support for Emilie, who had mental health problems. Janet also requested spousal support in order to maintain the standard of living that the parties enjoyed during the marriage.

The original child support order obligated Richard to pay Janet $1200 per month, commencing February 1, 1995, and increasing to $1585 per month as of April 21, 1995. The child support payments were to continue until Marjorie enrolled in college, or September 30, 1996, whichever occurred first. The original spousal support order

obligated Richard to pay Janet $500 per month, commencing February 1, 1995. The spousal support payments were to continue until January 31, 1997, after which the court reserved jurisdiction to award Janet additional spousal support.

The July 1995 supplemental judgment also included the following language. "There is no agreement as to support pursuant to Family Code § 3910[[2]]; however, in the event that the parties in the future reach an agreement between them which they desire to become a Court Order, the Court reserves jurisdiction to incorporate such an agreement into an Order of the Court. Furthermore, if either of the parties' daughters seek to obtain support pursuant to Family Code § 3910, this Court shall reserve jurisdiction to hear her petition as a claimant as part of this case. [¶] [] As for the college expenses of the parties' two children, Emilie Sweet and Marjorie Sweet, there is no agreement between the parties as to payment of said expenses; however, in the event the parties in the future reach an agreement between them which they desire to become a Court Order, the Court reserves jurisdiction to incorporate such an agreement into an Order of the Court."

On October 7, 1998, Janet filed a motion requesting modification of the child and spousal support orders. She did not specify an amount of requested support. She simply requested that the court "order an appropriate level of support to allow [her] to continue to discharge the obligation [the parties] committed to [their] children." Her attached income and expense declaration indicated that her gross income averaged $8925 per month, and that she had over $3143 in direct monthly expenses for Marjorie and Emilie, who were living in her home, while they had no income. Richard opposed the motion, arguing that Janet had presented no facts warranting an award of adult child support or additional spousal support. His income and expense declaration indicated that his gross income averaged over $18,000 a month, that he had remarried, and that he had two minor stepdaughters living in his

[2] "The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means." (Fam. Code, § 3910, subd. (a).)

household. The matter was originally set for trial on June 28, 1999, but was continued to November 1, 1999.

In Janet's pretrial statement and brief, she identified the relevant issues to be presented at trial as follows: "Should [Richard] pay to [Janet] additional spousal support as a result of her increased expenses in the discharge of a moral obligation to the two adult children of this marriage?" and "How much spousal support should [Richard] pay to [Janet]?" She indicated that she expected to "present testimony concerning her out of pocket increased expenses necessarily incurred for the benefit of the parties' two adult children." In Richard's pretrial statement and brief, Richard argued that Janet had presented no basis or change of circumstances on which the court could award additional spousal support. Richard also stated that he was contributing to Marjorie's college education expenses.

At the hearing on November 1, 1999, Janet conceded that Family Code section 3910 was not relevant to the proceedings, and that the only issue before the court was her request for modification of spousal support based on what she regarded as Richard's moral and social obligations with regard to their children. Janet testified that at the time of the 1995 judgment, Emilie[3] was attending college and was being fully supported by both parties. Richard paid between 50 and 60 percent of Emilie's living expenses, and Janet paid between 40 and 50 percent. However, Janet did not recollect how much she was actually paying. Janet testified that she is now paying 100 percent of Emilie's expenses. Richard stopped providing any living expenses to Emilie in September 1995. Emilie is currently under the care of a psychiatrist, at the cost of $140 per session. Emilie is also on two antidepressants. Janet pays for the psychiatrist's sessions and has filled Emilie's prescriptions. Janet also pays Emilie's car maintenance and insurance expenses, her medical insurance and other uninsured medical expenses, and some clothing expenses. Janet has also paid for major incidental things, such as Emilie's recent moving expenses. Emilie has her own apartment, drives a car, and works.

[3] Emilie is referred to in the reporter's transcript as Emily.

Marjorie was in high school at the time of the 1995 judgment, and was a college student at the time of trial. Janet's employer contributes $1000 per month to Marjorie's college tuition costs. Although acknowledging that Richard had made some contributions to Marjorie's expenses, Janet testified that she was "basically covering all of [Marjorie's] expenses," including her room and board, automobile expenses, uninsured medical expenses, clothing, travel, and other miscellaneous expenses. When asked on direct examination, "What is the total amount that you are representing to the Court to be your additional expenses for these two adult children that were not in existence at the time of the original Court Order reserving spousal support?" Janet responded, "I'm not sure of that exact number, but certainly going from paying only part of the costs to paying essentially all of the costs has been a significant increase."

Richard testified that he has contributed to Marjorie's college education, and did so before being served with Janet's motion. He paid $3500 for half of Marjorie's net out-of-pocket tuition, room, and board expenses for the current semester, and the same amount for each of her past two semesters. He has also set up an account at a bank in both his and Marjorie's name, funding the account with a deposit of $12,000. This was done so that there will be $4000 available to Marjorie for each of her next three semesters. Richard calculated the amount Marjorie needed based on her tuition and room and board, less Janet's employer's contribution, plus her travel expenses, books, and incidental expenses. He testified that, according to his calculations, he and Janet were paying equal amounts for Marjorie's expenses. He has made no contributions toward Emilie's expenses since September 1995.

In her closing argument, Janet asked the court to "expand" its reservation of jurisdiction over spousal support "to recognize or to set a specific amount of support and that is the expenses that she's paid on behalf of the children is the specific change of circumstance in which she relies in making this request." "I'm asking the Court to look at the earnings and ability to pay." "[T]he circumstance of one person taking care of these things in life . . . that they have the ability to take care of, both of them, . . . should be reviewed by the court as appropriate changes of circumstance in which to change the

spousal support." In his closing argument, Richard argued that there was no material change of circumstances as there was no evidence that Emilie was disabled or was likely to become a public charge, and he has paid one-half of the nonemployer-paid expenses for Marjorie since Janet's motion was filed. The parties then submitted the matter.

The court's Decision After Hearing was filed November 12, 1999. In relevant part the court stated, "[Janet] contends that her need for spousal support has increased because of her out of pocket expenses for the two adult children of the marriage. [Janet] concedes that the parties only have two adult children and although there was some evidence present that one of these children has some disability there was not sufficient evidence presented that this child cannot support herself and is at risk of becoming a ward of the state. [Janet] instead contends that there is a moral obligation to support these children and [Richard] has not met that obligation. [Janet] cites [*In re Marriage of*] *Siegel* (1972) 26 Cal.App.3d 88 and [*In re Marriage of*] *Paul* (1985) 173 Cal.App.3d 913 in support of this position. [Richard] responds that there has been no showing of a change of circumstances and, even if this prerequisite were met, [Richard] has made significant contributions to his daughter's college expenses. In addition, [Richard] cites [*In re Marriage of*] *Lautsbaugh* (1999) 72 Cal.App.4th 1131 to bolster [his] position. [¶] The Court finds [Janet] in this case is doing a kind and motherly thing. What she does for her daughters is good and moral; it is honorable, just and reasonable. However, she has not shown that there is a change of circumstances nor has she shown that these expenses are necessary and that would be the standard, not reasonable. Further, there is a real question whether [Richard] has not also made reasonable payments also. Therefore, the motion to modify is denied." The Order After Hearing was filed pursuant to the Statement of Decision on February 9, 2000. Janet filed a timely notice of appeal from the Order After Hearing.

DISCUSSION

Janet argues that the court applied the wrong standard in denying her motion to modify spousal support. Specifically, she argues that there is no requirement that the expenses she pays for her adult children be necessary as opposed to reasonable, given the parties' respective stations in life. As Janet and Richard contributed an equal amount

toward Marjorie's college expenses, but Janet additionally contributed toward Emilie's and Marjorie's "normal day to day living expenses" and her assistance was both reasonable and socially and morally appropriate under the facts and the circumstances of the case, the court erred in failing to consider this as an appropriate basis upon which to base a spousal support modification. As she did in the trial court, Janet cites *In re Marriage of Siegel*, *supra*, 26 Cal.App.3d 88 (*Siegel*), and *In re Marriage of Paul*, *supra*, 173 Cal.App.3d 913 (*Paul*), in support of her position. We find these cases distinguishable from the instant case on their facts.

In *Paul*, *supra*, the trial court denied the wife an increase in spousal support. (173 Cal.App. at p. 915.) On appeal, the wife contended that the trial court abused its discretion by failing to consider her expenditures on college tuition and related costs for an adult child as a factor in establishing her need for increased spousal support. The trial court record indicated that the husband had refused to help the adult child in this regard, but wife had continued to give assistance even though it placed a difficult financial burden on her. (*Id*. at pp. 918-919.) The appellate court determined that the trial court's refusal to consider the educational expenditures by wife for the adult child was an abuse of discretion. (*Id*. at p. 919.) "[C]ourts have expressly considered the fact that the supporting spouse is paying for the college education of an adult child when determining that spouse's ability to pay spousal support to the supported spouse. [Citations.]" (*Ibid*.) "It would be an anomaly for courts to entertain these expenses . . . as factors to be weighed when setting spousal support, and yet ignore such similar factors when it is the supported spouse who is expending monies on education of an adult child. . . . We find such inconsistency unacceptable and reject its further application to the instant case." (*Id*. at p. 920.)

In this case, Richard had not refused to help pay the college expenses of Marjorie, the parties' adult child who was attending college at the time of trial. In fact, the record supports the trial court's implicit finding that Richard was paying about one-half of Marjorie's college expenses that were not covered by Janet's employer's contribution. As Janet and Richard were expending roughly equal out-of-pocket amounts on Marjorie's

college education, the trial court did not abuse its discretion in not considering Janet's expenditures as a factor to be weighed when setting spousal support.

In *Siegel*, *supra*, the trial court granted the wife an increase in spousal support, reciting that the basis for the increase was the increase in cost of living, the increase in wife's expenses attributable to the fact she was caring for the couple's adult daughter and that daughter's child, and the material increase in the husband's income. (26 Cal.App.3d at p. 90.) The trial court record indicated that the adult daughter was divorced and unemployed, and had serious health problems which resulted in her hospitalization on six different occasions. Although the daughter obtained and lived in an apartment by herself on her doctor's advice after she last left the hospital, she took all her meals with wife. The grandchild was two years old at the time of trial, and had been cared for by wife while her mother was in the hospital and ever since. (*Id*. at p. 91.) Wife was also supporting two minor children from the parties' marriage, and child support for them was also increased. (*Id*. at p. 90.) On appeal husband contended that the part of the increase in spousal support attributable to wife's expenses for the adult child and grandchild was in substance an award for the support of those for whom he was not legally responsible. (*Id*. at p. 91.) The appellate court disagreed. "The trial court expressly noted it did not have authority in the case at bench to require [husband] to support his daughter and granddaughter. Nevertheless, it recognized [wife]'s moral and social obligation to her daughter and granddaughter and concluded this was a circumstance it might consider in determining her need, and the amount her former husband should pay for her support. Its conclusion did not constitute an abuse of discretion." (*Id*. at p. 93.) "As the trial court so wisely noted, in the event [wife] did not have the means to provide food for her daughter and to care for her granddaughter, she would deprive herself and the two minor children living with her in order to discharge a moral and social obligation to her daughter and granddaughter. The law, under the circumstances of the case at bench, should not require a mother and grandmother either to go without or cast her daughter and granddaughter into the street." (*Ibid*.)

In this case, Emilie, while having some mental health problems, was employed and apparently able to provide for her own food, shelter, and other necessities. There was

nothing in the record to indicate that Janet was in danger of going without, or that Emilie was in danger of being cast out on the street. (See also, *In re Marriage of Serna* (2000) 85 Cal.App.4th 482 (*Serna*).) Janet was not supporting any minor children, and Janet and Richard were providing roughly equal amounts out-of-pocket for the support of their other adult child. Richard's obligation to pay Janet any spousal support had ended almost two years before Janet filed her motion for additional support. Although it could be said that Richard's income had materially increased during that period of time, he had also remarried and had two minor children in his household.

In *Serna*, *supra*, wife, the supported spouse, included the expenses of one adult daughter and that daughter's two children in her own income and expense declaration, and testified that she often sent money to another adult daughter. There was no issue of incapacity as to either adult daughter. (85 Cal.App.4th at pp. 485, 487.) The appellate court found that the trial court erroneously predicated its spousal support order on a consideration of wife's needs that included a subsidy for the adult daughters. (*Id*. at p. 487.) Citing *In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, the court held that adult child support cannot be indirectly awarded under the guise of spousal support. (*Serna*, *supra*, 85 Cal.App.4th at p. 487.) "The central flaw in both *Siegel* and *Paul* is that they allow for the naked circumvention of a decision that has already been made by the Legislature – namely, that child support ends at age 19 at the latest, absent incapacity to earn a living. Neither case ever quite confronted the idea that it was allowing something to be done indirectly what could not be done directly." (*Serna*, *supra*, 85 Cal.App.4th at p. 491.) The trial court in this case did not abuse its discretion in failing to recognize Janet's payment of some of Emilie's expenses as a factor when determining Janet's need for spousal support.

Janet also argues that the court erred in failing to find a change in circumstances. She argues that her showing that Richard was paying 50 to 60 percent of Emilie's expenses at the time of the 1995 supplemental judgment, and had ceased making any payments toward Emilie's support shortly after that judgment was entered, was sufficient in and of itself to

show a change in circumstances. She further argues that the record additionally showed that she was making a greater contribution than was Richard toward Marjorie's expenses.

Based on the record before us, we cannot say that the trial court erred in failing to find a change in circumstances. The trial court was entitled to conclude that, other than through her employer's contributions to the tuition, Janet was not making a significantly greater contribution than was Richard to Marjorie's college expenses. In addition, although Richard paid much of Emilie's expenses while she was attending college, the 1995 supplemental judgment did not obligate Richard to do so. Richard had ceased making any payments towards Emilie's support because Emilie was no longer attending college. The 1995 supplemental judgment also did not obligate Richard to pay Janet any spousal support after January 31, 1997. That Richard's support payments to Janet and Emilie ceased as the parties expected cannot reasonably constitute a change of circumstances justifying an increase in spousal support. (See, *In re Marriage of Lautsbaugh*, *supra*, 72 Cal.App.4th at pp. 1133-1134.)

DISPOSITION

The post-judgment order denying the motion to modify is affirmed.

O'Farrell, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Wunderlich, J.

* Judge of the Monterey Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.